SUPREME COURT, U. S.

FILED
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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~1625~~ 139 - 61

ROCHESTER AND GOODELL ENGINEERS, INC., a Corporation, and HARRY BALKE, Individually, Doing Business under the Trade Name and Style of HARRY BALKE ENGINEERS,
Petitioners,

vs.

FLORIDA STATE TURNPIKE AUTHORITY, a State Agency, etc., *Respondent.*

CERTIORARI TO DISTRICT COURT OF APPEAL, SECOND DISTRICT OF THE STATE OF FLORIDA.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To The Honorable, The Supreme Court of the United States:

The petition of Rochester & Goodell Engineers, Inc., a corporation, and Harry Balke, individually, and doing business under the trade name and style of Harry Balke Engineers, respectfully prays for a writ of certiorari to the District Court of Appeal, Second District, State of Florida, to review the decision of the said Court rendered (effective date) the 20th day of March, 1961

OFFICIAL REPORT OF THE ORDER BY THE COURT BELOW.

1. (a) The final order of dismissal which petitioners seek to have reviewed, is that in the case of Rochester & Goodell, etc., *et al.* versus Florida State Turnpike Authority a State Agency, etc., 128 So.2d 202. (No opinion or judgment was entered.)

(b) STATEMENT OF THE GROUNDS OF JURISDICTION.

This court has jurisdiction to review said order of dismissal under Section 344 (b) of the Judicial Code (Section 1257 (3) of revised Title 28, U.S.C.A.). The grounds being that the District Court of Appeal, Second District, of the State of Florida, gave an unconstitutional meaning to a Florida statute in that under said Court's interpretation, said statute would deny citizens of due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and said order further violates the organic law prohibiting the levy, assessment and collection of taxes by a political subdivision in excess of its statutory authority.

The statute involved is Chapter 340.01, *et seq.*, Florida Statutes.

(i) The date of the final decree of the state court of original jurisdiction dismissing the complaint with prejudice was September 21, 1960, and it was entered the same day. The date of the order of the District Court of Appeal, Second District, State of Florida, dismissing the appeal, was February 22, 1961

(ii) The District Court of Appeal denied petition for rehearing on March 20, 1961.

(iii) This Court has jurisdiction to review said order under Sec. 344 of the Judicial Code. Sec. 1357.3 of Revised Title 28, U.S.C.A.

(c) The questions which are presented for the Supreme Court's consideration are:

QUESTION ONE.

That respondent is charging tolls substantially greater than are necessary to pay the principal and interest upon the outstanding bonds issued by respondent, and in excess of the amount of money reasonably required to maintain Project No. 1, in accordance with good, standard toll road maintenance requirements, and in excess of requirements for a reasonable reserve for the repairs to said Project No. 1. That as a result, the respondent is fully authorized to pay unto the petitioners the amount of money owed to them for their services, or in the alternative, the respondent should be required to reduce its tolls to collect an amount of money to meet the requirements above specified. Does not the collection of funds in a substantial amount over and above these requirements, that is not used to pay honest and legitimate and earned claims aganist the respondent, constitute an unlawful tax on the patrons of said toll road system as prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution?

QUESTION TWO.

That Chapter 340.01, *et seq.*, contains no provision that prevents the respondent from paying to the petitioners the amount of money owed to the petitioners, from a substantial excess of funds collected from tolls over the requirements for the orderly retirement of principal and payment of interest on the outstanding

bonds, plus a reasonable reserve for such purpose, and for the other requirements of the toll road system, and reasonable requirements and reasonable reserve therefor. Is not the respondent authorized to set up a fund for the purpose of paying the claim of the petitioners and not entitled to refuse to set up such fund from the excess funds hereinabove set forth, simply as a matter of arbitrary and capricious action, or failure to act, on the part of the respondent while meritorious claims are outstanding against the respondent, contrary to the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution?

QUESTION THREE.

Does a governmental agency, set up by statute, and which is a complete legal statutory entity with complete powers to perform the function for which said entity was created, *have inherent right of taxation* (through toll road fares or otherwise) to accumulate funds *in excess* of the actual requirements of the legal entity, together with reasonable reserve for such requirements?

QUESTION FOUR.

Where a legal entity that has specifically limited statutory taxing powers, levies, assesses, and collects taxes in excess of its legal requirements and thereby accumulates an unlawful excess of funds, and it is impossible to return the taxes to those who paid the same, is it not contrary to the provisions of the due process clause of the Fourteenth Amendment to the Constitution of the United States for said agency to fail and refuse to pay debts owed by it, but which are not otherwise legally collectible?

(d) The statute involved is Chapter 340.01, *et seq.*, Fla. Statutes 1941, the pertinent parts of which are as follows:

"340.12 (3) Such tolls shall be so fixed and adjusted in respect of the aggregate of tolls on each turnpike project in connection with which the bonds of any issue shall have been issued as to provide a fund sufficient with other revenue from such turnpike project to pay (a) the cost of maintaining, repairing and operating such turnpike project and (b) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserve for such purposes."

STATEMENT OF THE CASE.

(e) The case has arisen on the following facts:

The respondent is organized and exists under Chapter 340.01, *et seq.*, Florida Statutes Annotated, which is a rather comprehensive toll road special statute, setting up the entire authority and providing for its organization, administration, rights and liabilities and principal functions (T. 1).

The petitioners and the respondent entered into a certain written contract, copy of which is attached to the complaint, whereby the respondent employed the petitioners to perform certain necessary engineering work for Section 17 of Project No. 2, of the Sunshine State Parkway, Fort Pierce to Jacksonville. The contract described the work to be done by the petitioners and such work had to do with the engineering services necessary for the construction of a toll road, as authorized by said Chapter 340.01, *et seq.* The contract provided how the petitioners should be paid and the amount of payment and other usual incidentals to such an engineering contract (T. 1-2).

Thereafter, the work required by the contract was fully performed by the petitioners but they have been paid

only a small part of the money that they should receive for their services (T. 2-3).

The petitioners thereafter brought their suit in the Circuit Court of the Fifteenth Judicial Circuit in and for Broward County, under the declaratory judgment statute of the State of Florida, and asked that the Court declare that the respondent *has excess funds* from which it could pay the petitioners for their services; that the Court further declare as to the amount of money owed by the respondent to the petitioners; and that the Court enter an order for such coercive relief against the respondent and in favor of the petitioners as necessary to discharge the debt owed by the respondent to the petitioners; and prayed for such other and further relief in the premises as to the Court might seem meet and proper (T. 4).

Thereafter, on July 21, 1959, the respondent filed its motion to dismiss this cause (T. 24).

Thereafter, on September 21, 1961, the Honorable Ted Cabot, one of the Judges of the lower State Court, entered an order dismissing this cause with prejudice (T. 24-25).

It was at this point that the state court of original jurisdiction ruled that the petitioners could not state a cause of action and ordered the suit dismissed with prejudice, although the order did not specify the reasons for the ruling of the Court (T. 24-25).

Thereafter, the petitioners duly appealed the cause to the District Court of Appeal, Second District, for the State of Florida.

Thereafter, on February 22, 1961, said District Court of Appeal entered an order dismissing the appeal (T. 27-28). *At this point the District Court of Appeal affirmed the order of the state court of original jurisdiction, by dismiss-*

ing the appeal, and which order of dismissal did not specify the reasons for dismissing the appeal (T. 29). On March 20, 1961, the District Court of Appeal denied the petitioners' reque t for rehearing in the cause (T. 29).

It is interesting to note, that although the petitioners requested the District Court of Appeal to give its reasons for dismissing the appeal by way of petition for rehearing, the said court failed and refused so to do (T. 29). If a stranger should read this record he would never know what was considered by the state courts and what decisions of law, if any, were made. Certainly, this cannot be said to constitute "due process".

The decision of the District Court of Appeal, according to the rules of Appellate procedure of the State of Florida, appears to be the final Appellate decision that can be made in that state. Although in an abundance of caution, a notice of appeal to the Supreme Court of the State of Florida has been filed in said Court.

ARGUMENT.

Questions One and Three.

The state court of original jurisdiction was not entitled to dismiss the complaint upon the face of the record because there is nothing in the record to refute the allegation of the complaint that:

> "Defendant is, and for some time last past, has been receiving monies in tolls on Project No. 1 of Sunshine State Parkway, which is a segment of the total proposed toll road, in excess of the amount of money necessary for principal and interest requirements on the bonds outstanding, issued for the purpose of constructing Project No. 1, and in excess of the amount of money reasonably required to maintain said Project No. 1 in accordance with good, standard, toll

> road maintenance requirements, and in excess of requirements for reasonable reserve for repairs to said Project No. 1. That as a result thereof, there is an amount of money in the hands of the defendant over and above the requirements next above *immediately specified* and which said funds could be used to pay the plaintiffs herein for their services rendered."

Neither was the District Court of Appeal entitled to affirm the order dismissing the complaint containing this language.

On the contrary, Sec. 340.12 (3) of Florida Statutes Annotated, hereinafter referred to as the "Turnpike Statute" provides:

> "Such tolls shall be so fixed and adjusted in respect of the aggregate of tolls on each turnpike project in connection with which the bonds of any issue shall have been issued as to provide a fund sufficient with other revenue from such turnpike project to pay (a) the cost of maintaining, repairing and operating such turnpike project and (b) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserve for such purposes."

It cannot be said that the defendant or any other taxing agent has the right to assess and levy taxes and continue so to do for purposes not authorized by the law. These excess funds are not authorized by the Turnpike Statute, by Sec. 340.12 (3).

It might be well for all of us to remember that this is one of the great distinctions between a governmental agency, whether it be national, state, county, or special taxing district; and private persons, firms, or corporations. Private individuals may save money, accumulate money for any purpose we wish to, and are accountable to no one except Internal Revenue Service. However, a taxing unit which lives only by virtue of its right to tax for its ex-

istence and its necessary functions, and certainly within the statutory limitations set forth, cannot tax for a greater sum of money than is necessary to perform its lawful functions, as specified by the statute creating it.

The general law throughout the country is that the power of taxation may not be delegated by the legislature to a board or agency, although the legislature may set up a method by which taxes may be computed and delegate and direct the computation and collection thereof by an agency. This has been held by state courts and also by Federal courts.

In the famous case of *Panama Refining Company et al. v. Ryan*, 79 L. Ed. 477, 293 U.S. 388, decided by this court in 1934, and which was the decision wherein this Court struck down Section 9 (c) of Title 1 of the National Industrial Recovery Act, one of the so-called New Deal laws, the opinion being by Mr. Chief Justice Hughes, this Court said:

> "Fifth. The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."

While we recognize this case construes the applicable provisions of the Federal Constitution, to-wit, Article 1, Sections 1 and 8, nevertheless the same principle applies to the state courts and any action by a state board that is contrary to this organic rule of law, is cognizable by this court because such action would be in violation of the guarantee of due process under the Fourteenth Amendment. In the instant case we are not complaining about the Flor-

ida Statute in itself being an unlawful delegation of the taxing power of the Florida Legislature, but we are complaining that the action of the Florida Turnpike Authority in arrogating unto itself the power to tax beyond the requirements and limitations and purposes set forth in the Turnpike statute (Chapter 340.01 Fla. Statutes), which is the very Genesis of the Turnpike Authority, is a deliberate, clear, present, and continuing violation of the due process clause of the Fourteenth Amendment. Of course this violation consists of collecting excess taxes (tolls) far and beyond the legal requirements and authority of the board so to do.

In the annotation to the *Panama Refining Company* v. *Ryan* case, *supra*, appearing on page 549 of 79 L. Ed., the editors had this to say:

> "TAXATION AND ASSESSMENT MATTERS. Generally, the legislature cannot delegate to an administrative board the power to determine the rate of taxation, or to say whether or not taxes shall be collected at this or that rate."

This principle of law is so well settled that the editors of American Jurisprudence have, in 51 Am. Jur., Sec., 144, p. 194, on the subject "taxation", expressed the rule in this manner:

> "The broad proposition that the power of taxation, which is essentially a legislative function, may not be delegated to others by legislature is asserted or recognized in a large number of cases. It is, however, subject to a number of exceptions, modifications, and qualifications * * *. Furthermore, it is recognized that certain aspects of the taxing process are not legislative in the sense that they may not be delegated to other governmental agencies, or even to individuals, if in making such delegation, the legislature retains

sufficient and proper control over those elements of the taxing function which are non-delegable."

and:

"Thus, a distinction is drawn between the elements that enter into the imposition of a tax and the ministerial and administrative steps taken for its assessment and collection; the latter being delegable, the former not. In the light of this distinction, a state legislature cannot delegate to an administrative board the power to determine the rate of taxation, or to say whether or not taxes shall be collected at this or that rate. It may, however, be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate."

It would seem from this that a statute, such as the Turnpike statute, with which we are concerned, that delegates the power to tax by prescribing a formula for arriving at the tax, is constitutional. In the instant case, the statute itself is as follows:

"340.12 (3). Such tolls shall be so fixed and adjusted in respect of the aggregate of tolls on each turnpike project in connection with which the bonds of any issue shall have been issued as to provide a fund sufficient with other revenue from such turnpike project to pay (a) *the cost of maintaining, repairing and operating such turnpike project and (b) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserve for such purposes.*"

So it is evident that this state statute is probably within the meaning of the due process clause of the Fourteenth

Amendment so long as the statute is strictly followed by the Turnpike Authority. However, if such Authority disregards the strict limitation of taxing powers granted to it by the Florida Legislature, then such disregard constitutes the deprivation of due process. In other words, if a statute were such that it delegated taxing power (as oposed to a formula for taxing) to a Board, violated the due process clause, then certainly action of a Board created by a statute, would accomplish the same thing, that is to say, that by such action the Board took unto itself the power to levy, assess, and collect taxes beyond the purposes and function set forth by the statute and for said Board, then certainly such unlawful, exceeding its statutory power to tax by the Board, would do violence to the due process clause. In the instant case, the complaint alleges (and must be taken as true for the purpose of this determination), that the respondent, through setting a rate of toll higher than necessary, to pay

> "*The cost of maintaining, repairing, and operating such turnpike project and (b) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserve for such purposes.*" (Chapter 340.12 (3), Fla. Statutes),

has created an unlawful and excess fund, which we respectfully assert, first, should be used to pay the honest debts of the Authority and second, that the Turnpike Authority should be restrained from exceeding its taxing authority as provided by the statute, creating the Authority.

In 90 *Corpus Juris Secundum*, on page 1008, on the topic of Turnpikes and Toll Roads, Section 65 we find the law to be:

"Sec. 65—Rate and Amount.

"The determination of what measure shall be adopted for the exaction of tolls for the use of highways is within the power of the legislature, but the courts will not permit the imposition of unreasonable charges or uphold a legislative regulation of amount which is unreasonable.

"The determination of what measure shall be adopted for the use of highways is within the power of the legislature, which, except as it may affect the rights of bondholders outstanding, and existing by authority of legislative enactment, can control the amount of toll charges or cut them out completely. *The amount of tolls is said to be governed by the cost of the property or improvements for the use of which they are charged; and a statute providing that the amount of toll charges shall be such as will produce revenue at least sufficient to pay, when due, all bonds with interest, and expenses of operation and maintenance reserves therefor does not authorize toll charges in excess of such amount as is necessary to pay the bonds and expenses of operation.*" (Emphasis supplied).

So it is that such unauthorized action on the part of a Board, or Agency, or Commission, regardless of the fact that it is a state agency, violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Such a violation is exactly the situation we have here.

Questions Two and Four.

So it is, the respondent has accumulated such an unlawful excess that it must be dissipated, and the only constitutional, equitable and meritorious manner in which it can be dissipated is to pay honest and lawful debts incurred by the respondent, and which, some day, sooner or later, must be paid. Inasmuch as this fund constituted

by unlawful and excess collection of taxes, is in the hands of the respondent and must be used for some purpose lawfully connected with the respondent, and such excess funds cannot possibly be returned to the persons who paid it in, then is it not in violation of the due process clause of the Fourteenth Amendment for the respondent to withhold payment of debts created by affirmative acts of the part of the respondent?" The debt to the petitioners was created by an affirmative contract entered into by the respondent and the petitioners for engineering services on said toll road.

We respectfully urge the Court that it is only just and equitable, as well as *constitutional* (due process of the right of these petitioners to be paid), that this debt should be paid now out of these excess available funds, and, this having been done, this Court may wish to warn this taxing agency that it shall only tax in accordance with its source of power so to do, and only in amounts and for the purposes allowed therein, to-wit: Section 340.12 (3) Florida Statutes.

The respondent having violated this statute, by collecting tolls (taxes) grossly and vastly in excess of the statutory requirements, to which the tolls (taxes) are limited, then *these excess funds are not limited to the afore-mentioned statutory requirements and can be used for any other honest debts incurred by the respondent, such as the debt to the petitioners herein.*

The respondent cannot avoid creating a special fund as provided in Sec. 10 of the contract (T. 15), from these excess funds merely because of caprice upon its part. Inasmuch as it must be presumed, at least for the purpose of this argument, that respondent has properly set up a sinking fund for the interest and principal payment of the bonds, and a fund for the cost of maintaining, repair-

ing and operating said Turnpike Project, then it becomes necessary for this Court to determine to what purpose the excess funds alleged in the complaint, shall be put to. It would seem logical and fair and equitable, and an actual carrying out of the guarantee of the due process clause of the Fourteenth Amendment to the United States Constitution, that said excess funds, having been collected over and above the statutory authority and requirements, should be put to some useful and necessary function in connection with the respondent.

May we ask what would be the most necessary and equitable and due process function that these funds could be used for? In order to answer that question, we must ask what fund has not been properly established? The sinking fund for the principal and interest payments has been properly set up and serviced; the fund for the cost of maintaining, repairing, and operating such Turnpike Project has been set up; and the reserve for each of such purposes has been created—so it cannot be said that it would be a necessary and proper function to apply these *excess monies* to these two purposes. Whatever purpose then remains to be served by the application of these excess monies? The question answers itself—the claim of these petitioners for work honestly done under a contract signed with the respondent. If excess monies are not used to pay these petitioners, then the only remaining thing it could be used for would be to return the same to those from whom the tolls (taxes) were collected, and of course that would be an impossibility.

CONCLUSION.

So it seems clear that the proper course is for the respondent to be ordered to pay the petitioners compensation for their work done for the respondent out of the existing excess funds on hand. To take any other course would be inequitable, unjust, and unconstitutional.

Why It Is Important for This Court to Grant Certiorari.

Probably the greatest problem facing America today is that of National Defense and the possible consequences of atomic energy. There is very little this Court can do concerning National Defense. There is nothing this Court can do concerning atomic power, at least so far as its use is concerned.

We believe that the most important problem facing America today, with which this Court can deal, is that of a growing multitude of governmental agencies from the President of the United States on down to the Mayor of the smallest village, having certain taxing powers, and the power to lawfully, and in some cases unlawfully, extract the fruits of our labors and our investments from us. As to the lawful taxes, there is nothing this Court can do. As to the unlawful collection of taxes, this Court can restrain the same and set a precedent that will be a clear and present and continuing warning and command to all governmental agencies, national, state, district, local and municipal, that they cannot levy, assess, and collect taxes and extract the wealth of the people from them, *except by due process of law* * * * otherwise, we may find that the diversion of our economic strength has been such that there was not enough left for the maintenance of the necessary and legal functions of ourselves and our various governmental entities. Communist China has followed this

course and is now on the brink of economic and political chaos.

We therefore respectfully urge that this Court grant a writ of certiorari in this case, consider the profoundly important legal question involved, and give a clear enunciation by which all of our governmental agencies may be guided and, if necessary, restrained.

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